IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.351 OF 2006
WITH
CIVIL APPLICATION NO.432 OF 2006

Edna Mathew Thekkakara ..Appellant
(Org.Plaintiff)

Vs.

Mrs.Tassy Joseph Demello & 13 Ors. ..Respondents
(Org.Defendants)

Mr.A.K.Abhyankar i/b Mr.P.G.Pravin for the appellant

Mr.Soli Cooper with Mr.Sanjeev Singh for respondent no.1 to 4

Mr.V.A.Thorat with Mr.Bipin Joshi for respondent no.5

CORAM : A.M.KHANWILKAR, J
DATED : 15TH JUNE, 2006

P.C.:

1. Heard the counsel for the parties. Admit. Mr.Sanjeev Singh for respondent nos.1 to 4 and Mr.Bipin Joshi for respondent no.5 waive service.

2. As short question is involved the matter is taken up for final disposal forthwith by consent.

3. This appeal from order takes exception to the judgment and order passed by the City Civil Court dt.29.4.06 in Notice of Motion No.794 of 2006 in L.C.Suit No.1047 of 2006. For the nature of order that I propose to pass it is not necessary to advert to all the factual matrix. Suffice it to observe that this is the second round of litigation in the present proceeding between the parties upto this court. On the earlier occasion, the appellant had filed appeal from order before this court being Appeal No. 175 of 2006 to question the correctness of the order passed by the trial court on the issued of ad interim relief. That order was set aside and the parties were relegated to trial court to enable the trial court to decide the notice of motion on merits. By the impugned judgment, the notice of motion has been finally disposed of by the trial court.

4. The grievance of the appellant before this court, in substance, is that, several documents which have been pressed into service on behalf of the appellant to substantiate the plea of

possession as claimed by the appellant have not been referred to much less the efficacy thereof considered by the Trial Court at all. Without examining those documents which are relevant to the point in issue, conclusion has been drawn by the court below on the factum of possession, which cannot be sustained. There is substance in this submission.

5. The counsel for the appellant has relied upon the proceedings between the predecessors of the parties filed before the Trial Court and the orders passed thereon. Reliance is placed on observation made in the said proceedings by the concerned court. Reliance is also placed on other documents which are already produced before the Trial Court. It is therefore submitted by the appellant that there are two options before this court either to consider all the materials itself or to relegate the parties before the Trial Court for a fresh decision on the notice of motion in accordance with law.

6. The counsel for the respondents however,

justifies the conclusion reached by the Trial Court on the basis of self same documents which are pressed into service by the appellant. The fact remains that the Trial Court has not considered these documents. In the first instance, the trial court ought to have undertaken that exercise so that this court would have had the advantage of the reasons recorded by the Trial Court regarding the efficacy of those documents. That has not happened in the present case.

7. The appropriate course to my mind, without expressing any opinion on the contentions raised before this court relying on those documents, would be to set aside the impugned order so that the parties are relegated before the trial court for afresh consideration on all aspects of the matter. The Trial Court inturn is expected to record its reasons particularly regarding the efficacy of the documents which are pressed into service at the time of hearing.

8. Accordingly, this appeal succeeds. Impugned order is set aside. Notice of Motion is

restored to file to its original number to be considered by the Trial Court afresh on its own merits uninfluenced by any observation made in the impugned order or for that matter the present order.

9. Till the disposal of the Notice of Motion, the interim arrangement observed between the parties as is recorded in the order dated 29.4.06 shall continue. Trial Court will be well advised to dispose the notice of motion finally not later than 28.7.06. Parties shall appear before the Trial court on 26.6.06 on which date the Trial Court shall assign the next date of hearing or may proceed with the hearing of notice of motion on the same day as may be advised so as to ensure that the notice of motion is finally disposed of before the specified date.